SEGREGATION ORDINANCES.

During recent years, beginning with the ordinance of the City of Baltimore of May 15, 1911, cities throughout the South have attempted, by what are known as "Segregation Ordinances," to provide separate residential sections for white and colored persons.

While this form of segregation of the races is, in this country, a thing of recent date, there are several examples furnished by history. The Jews during the middle ages were restricted to quarters assigned them, which became known as "Ghettoes." This same race is to this day, in Russia, restricted to certain districts. In Ireland, there were years ago limits prescribed, beyond which the native Irish or Celtic population could not reside, and which became known as the "Irish Pale."

It is proper by way of introduction to determine the purpose and necessity of these ordinances, for segregation can not be constitutional unless for a lawful purpose arising from a reasonable necessity.

The purpose as usually expressed is to preserve the peace, prevent conflict and ill-feeling between the two races, and thereby promote the welfare of the city. The dominant purpose of the ordinances under consideration is to prevent too close association of the races, which association results, or tends to result, in breaches of the peace, immorality and danger to health. Ashland *v.* Coleman, 19 Va. Law Register 427. The title of the ordinance of the City of Louisville is in these words: "An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively."

A reasonable necessity for segregation arises from the ill-effect of a too close commingling of the two races, which is of ill effect to both, and which seriously interferes with the efforts of civic and moral uplift and betterment. In State *v.* Gurry (Md.), 88 Atl. 546, 551, "No intelligent observer in communities where

there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races which are likely to, and occasionally do, result in outbreaks of violence and disorder. It is not for us to say what this is attributable to; but the fact remains—however much it is to be regretted—and if a segregation of the races to such extent as may be permissible under the Constitution and laws of the land will have a tendency, not only to avoid disorder and violence, but to make a better feeling between the races, every one having the interests of the colored people as well as of the white people at heart ought to encourage rather than oppose it." The court in one case took judicial notice of the fact that the preservation of public morals, public health and public order in cities and towns is endangered by the residence of white and colored persons in close proximity to one another. Ashland *v.* Coleman, 19 Va. Law Register 427. The white who reside among colored persons are found to be of the most degraded and vicious element, and their presence of injury to the other race. Of this class is the immoral woman and the seller of intoxicants.

The South is committed to the principle of the separation of the races whenever and wherever practicable and expedient for the public welfare; not to segregation as a measure imposing stigma, for none is thereby imposed, but in order to prevent such conflicts as have resulted from the racial discord consequent upon the close association of the races, and in order that the solidarity of the races may be preserved, and, finally, that in a spirit of mutual helpfulness and racial friendship each race may attain those heights of human development which are its to be won, and may aid in bringing to state and nation all that the undreamed future has in store.

Those who have studied the future of the colored race declare that they must ultimately rise largely through the coöperation, the earnest efforts, and the loyal service of their own more fortunate and more enlightened members. For those of the race who are doing their full duty in this respect, municipal segregation will simplify the problem; and, if there be those more fortunate members of the race who in the day of their good fortune would abandon their less fortunate fellows and be false to the

duties and responsibilities laid upon them by virtue of their own success, municipal segregation will indirectly enforce their acceptance of those responsibilities and coerce their performance of the duties thereby imposed, and thus, in the end, it will justify that enlightened civic spirit by which it is demanded.

CHARTER POWER OF MUNICIPALITY.

The question of the charter power of the municipality has arisen in every reported case on this subject. In Virginia the towns and cities of the State are expressly granted the power to adopt segregation ordinances by the Act of March 12, 1902; Acts 1912, p. 330. Prior to this act the town council of Ashland enacted segregation ordinances. While the city had no express authority to pass such ordinances, it was held, in the corporation court for that city, that if such ordinances tend to promote peace and good order within the city, they are within its incidental and implied powers, as an exercise of the police power expressly conferred by section 1038 of the Code of 1904. "At the time of the passage of the ordinance, the Town Council of Ashland had no authority, in express words, to pass such an ordinance. It did have, however, under section 1038 of the Code, express authority to preserve the peace and good order within its limits, and therefore, impliedly, to pass an ordinance necessarily incident to the power expressly granted. Therefore (independently of any objections raised to the ordinance, will be considered hereafter), if this ordinance tended to promote peace and good order within the Town of Ashland, it was within the implied and incidental powers of the Town of Ashland to pass the ordinance, under the exercise of the police power conferred upon it by section 1038 of the Code of 1904." Town of Ashland *v.* Coleman, 19 Va. Law Reg. 427, 433.

It was contended that the subsequent enactment of the general statute conferring express authority to enact segregation ordinances, was a legislative construction, precluding the existence of such power under section 1038 of the Code, but the court held that such power was not precluded by the act. Town of Ashland *v.* Coleman, 19 Va. Law Reg. 427.

A municipal corporation possesses such powers: 1. As are granted in express terms: 2. As are necessarily or fairly im-

plied from its express powers; and 3. Those incidental powers which are appropriate to such corporation or are essential to the objects and purposes which it was created to fulfill.

In most states municipal corporations have not had this express power granted to them by a State legislature, and the question arises whether a municipal corporation has such power under its implied or incidental powers?

The Supreme Court of North Carolina held that the authority conferred upon a municipal corporation to enact ordinances for the "general welfare of the city," could not be justly construed as intended by the legislature to authorize segregation ordinances. The court said: "To do so would give to the words 'general welfare' an extended and wholly unrestricted scope, which we do not think the legislature could have contemplated in using those words." State *v.* Darnell, 166 N. C. 300, 81 S. E. 338. The Supreme Court of Maryland held practically the same thing in State *v.* Gurry (Ind.), 88 Atl. 546.

The North Carolina court based its decision upon the ground that an act of such broad scope, so entirely without precedent in the public policy of the State and so revolutionary in its nature, can not be deemed to be within the purview of the legislature from the use of the words "confer authority to make ordinances for the general welfare." In support of its reasoning the court refers to an act of the legislature of the State forbidding labor agents carrying out of the State skilled laborers on whom many farmers depend for the cultivation of their crops, as a declaration of a public policy contrary to a legislative grant of authority to a municipal corporation to segregate white and colored persons. But it seems that in this instance the court does not refer to legislation showing a contrary policy at all. There can certainly be little weight in the reasoning of the court that this labor-agent act shows a policy of the State to prohibit segregation. With more force of reason, the court could have referred to separate school laws, separate railway coach laws, etc., mentioned in this article, which show a settled legislative policy of the State in harmony with segregation.

The Maryland court pursues a much more logical process of reasoning in reaching the conclusion that such power is not

within the legislative grant, by basing its opinion upon the ground that the ordinance is unreasonable, stating that the ordinance wholly ignores vested rights by making it unlawful for a person to own and use property when he became its owner, to move to or rent it, except to members of a particular race, thus practically confiscating it, by compelling him to allow it to remain idle or sell it at a possible sacrifice. What the court, in fact, held is that the ordinance was not within the charter power of the city, because unconstitutional. The court evidently intended to avoid the decision of the constitutionality of the ordinance, and in its conclusion does avoid the point and yet necessarily decides it in the premise on which the conclusion is based. Therefore, it would seem the constitutionality of such ordinances was unfavorably passed upon.

Despite the weight of the above two cases, if a segregation ordinance is a valid exercise of the police power at all, such power is certainly reasonable and fairly within the incidental and essential powers of a municipal corporation possessing the power to provide for the general welfare of its citizens.

Under § 2783 of the Kentucky statutes, which provides "that the General Council shall have power to pass, for the government of the city, any ordinance not in conflict with the Constitution of the United States, the Constitution of Kentucky, and the statutes thereof." It was held in a lower-court case that the city of Louisville had power to enact segregation ordinances. Buchanan *v.* Warley, unreported, affirmed 177 S. W. 472.

So far as the functions of a municipal corporation are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body can not refer the exercise of the power to the discretion and judgment of its subordinates or any other authority. Do these ordinances come within this rule? In Ashland *v.* Coleman, 19 Va. Law Reg. 427, it is held that the operation of the ordinances does not depend upon the subsequent action or consent of anyone, but immediately upon their passage they become effective, prohibiting the establishment of residences, in the future, upon any street or block, by white or colored people, not upon the consent, or by the action of, a majority of the residents of such block or street, but by the

fact that a majority of the residents of such block or street, are either white or colored. The residents themselves have absolutely no authority in the premises.

DISCRIMINATION.

While the object of the fourteenth amendment to the Constitution of the United States is undoubtedly to enforce the absolute equality of the two races before the law, in the nature of things it can not be intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Plessy *v.* Ferguson, 163 U. S. 537, 41 L. Ed. 256, 16 S. Ct. 1138.

Whatever other objections may be urged against them, it can not be truly said that there is any discrimination in the ordinances against the colored race. Indeed, in its practical operation they would be more burdensome on white people than on colored people, for it is well known that white people own the great bulk of property in the different cities, and hence, where the property of one colored person would be affected by such ordinances, those of many more white people would be. What is denied one class is denied the other; what is allowed one class is allowed the other. There is, therefore, no such discrimination as is prohibited by the amendment. State *v.* Gurry (Md.), 88 Atl. 546, 551. See Ashland *v.* Coleman, 19 Va. Law Reg. 427.

An objection urged against these ordinances is that they are unreasonable and discriminatory in that the opportunity is given the white man to improve his condition and his surroundings by moving into a better locality, whereas this right is denied the colored man. It seems a sufficient answer to this objection to say that it is founded upon the false assumption that the only way, or at least one of the best ways, for a colored man to improve his condition and his surroundings is to move into a block a majority of the houses on which are occupied by members of the white race. To admit the soundness of this assumption would be to ascribe to the negro race a lack of capacity for self development, a want of self respect and of thrift, and a degree of dependence upon the white race which, it seems, the

history, past and current, of that people does not sustain. Besides, of course, in determining whether the right thus contended for is one which the law could recognize and enforce, regard must be had also to the correlative rights of those members of the other race who would be most directly affected by its exercise.

Another objection made to these ordinances is that in the clause concerning mixed blocks the privilege or opportunity of colored persons to live on the same block with white persons, and of white persons to live on the same block with colored persons is denied; and it is insisted that, as the ordinances do not molest those already so established but do, for the future, and only as to blocks whose residents are not mixed, forbid a white person from taking up his abode on a block where colored people occupy a majority of the houses, and vice versa, the person thus forbidden is denied an advantage which, under the law, he is entitled to enjoy.

Whether or not the ordinances are open to the objection here urged, must depend upon whether in the eye of the law it is an advantage to, or for the good of, the members of either race to live on the same block with members of the other. All enactments looking to the separation of the races, presumably at least, are founded upon the proposition that experience has revealed that certain evils result from the too constant and promiscuous commingling of their members, which evils such enactments are in theary calculated to prevent. In other words, the philosophy upon which all such legislation rests, is that, so far from being an advantage to the members of either race to be brought into close social contact, the reverse is true. If the various laws which have been enacted on this general subject do not establish that as a principle of public policy, then the laws of a people are no safe criterion of their public policy. It must be concluded, therefore, that in the view of the law the advantage here contended for is not in truth an advantage, even when considered only from the standpoint of the one who seeks it. But the law regards this general subject primarily from the standpoint of the well-being and the rights of the members of one race as related to those of the other, rather

than from the standpoint of the rights of different members of the same race between each other; and while it might be true in a given case that an advantage would or would not accrue to one colored person over other colored persons, or to one white person over other white persons from his being permitted to reside on a block with people of the opposite race, yet the question of his legal or constitutional right to do so obviously can not be determined on that basis. Quarles, Jr., in Buchanan *v.* Warley, No. 88,705 (Louisville) Jefferson Cir. Ct.

The enforced separation of the races alone is not a discrimination or denial of the constitutional guaranty; and, if such separation should result in the members of the colored race being restricted to residence in the less desirable portions of the city, they may render those portions more desirable through their own efforts, as the white race has done. They may open new subdivisions whenever their means and industry enable them to do so. Harris *v.* Louisville (Ky.), 177 S. W. 472.

In the language of Mr. Justice Bradley in the Civil Rights Cases, 109 U. S. 6, "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Are these segregation ordinances unconstitutional because they constitute a deprivation of property without due process of law? This is a difficult question and one upon which the few decisions thereon are conflicting.

Of the Baltimore ordinances the court in State *v.* Gurry (Md.), 88 Atl. 546, said: "The serious objection to them is that they wholly ignore all vested rights which existed at the time of the passage of the ordinance. Prior to that time any white person undoubtedly had the right not only to own, but to move into and use as a residence or place of abode, any house, etc., situated in what is by § 1 made a colored block, and a colored

person had the same rights as to what is by § 2 made a white block. If the traverser, for example, on May 15, 1911, when the ordinance was passed, owned a dwelling in what was made a white block, he could not under the ordinance move into it, although it was perfectly lawful for him to own it when he became owner and to use it as a dwelling. He might be unable to rent it to a white person, and as a colored person was prohibited from moving into it he could not rent it to a colored person, and he could not under the ordinance move into it himself. The result would be that his house would remain idle, unless he could sell it, which would under the circumstances likely be at a great sacrifice, although when he acquired it he had the right under the Constitution and laws of Maryland to occupy it as his dwelling, or to rent it to any person, white or colored, to be used for legitimate purposes. Or it might be that a white person had a valuable and attractive house in a 'block' which was otherwise occupied by colored people, yet if, at the passage of the ordinance, it happened to be unoccupied as a dwelling, he could not under the ordinance move into it or rent it to a white person. To deny him such rights would be a practical confiscation of his property, for his house might be of a character he would not rent to a colored person, and if he could not use it himself he would be deprived of not only the income from it but of such use of it as is guaranteed to every owner of property by the Constitution and laws of the land. Of course, the same conditions might exist when the owner of the one house was colored and the other residents of the block were white, although probably not so likely to happen." The above, however, is dictum.

In Carey *v.* Atlanta (Ga.), 84 S. E. 458, it is said: "Assuming that in any mixed block—that is, one occupied by both white and colored persons—there are three adjacent lots owned by separate persons, each of whom resides on his lot, and that the proprietor of the middle lot be a white person, and that the proprietor on one side be a white and the proprietor on the other be a colored person: If the middle proprietor should desire to move out and substitute a colored tenant, he could not do so if the adjacent white proprietor objected; or, if he should sell to a colored person the purchaser could not move into the house to reside, or substitute

another colored person to do so, if the adjoining white proprietor objected. So, also, if the middle proprietor were a colored person and should desire to move out and substitute a white person to reside in his dwelling, he could not do so if the colored adjoining proprietor objected; or, if he should sell to a white person, the purchaser could not move into the dwelling to reside, nor substitute a white tenant to do so, if the colored adjoining proprietor objected. In each of such instances an owner of property could, by mere force of the ordinance and caprice of an adjoining proprietor, without any compensation or process of law, be deprived for all time of the right to reside on his property, or substitute a tenant or grantee to do so. The right of the owner of property to reside on it is inherent, and permanent deprivation of that right is in substance a taking of the property itself. Deprivation thereof in the manner above indicated, without any symbol of legal procedure, is opposed to the guaranty as embodied in the due-process clauses of the State and Federal Constitutions." This point was directly involved in the case.

In State *v.* Darnell, 166 N. C. 300, 81 S. E. 338, it is said: "An ordinance of this kind forbids the owner of property to sell or lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the jus disponendi, has always been one of the inalienable rights incident to ownership of property which no statute will be construed as having power to take away. * * * There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars, and in similar matters. It was also held in Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, that, as the state had the right to regulate or forbid the sale of liquor, that one who had devoted his property to such purpose could not object that he is forbidden longer to so use it; but none of these interfere with the fundamental right of every one to acquire and dispose of property by sale." The court in this case was not called upon to decide the point.

In Ashland *v.* Coleman, 19 Va. Law Reg. 427, it is held that the town of Ashland had full authority under § 1038 of the Code of 1904 to pass the Ordinance of Sept. 12, 1911, providing for

separate residences for white and colored people within its limits; and the ordinance, which is wholly prospective in its operation, affects alike and operates impartially upon all persons and property under the same circumstances and conditions within the sphere of its operation, and makes no discrimination in favor of either the white or colored race. It is, therefore, a reasonable exercise of the powers of the municipality and does not conflict with the fourteenth amendment of the Constitution of the United States. This is a lower-court case and does not go so very fully into the question of deprivation of property without due process of law.

The last case upon this subject is that of Harris *v.* Louisville (Ky.), 177 S. W. 472, which holds that the ordinances of the City of Louisville do not constitute a deprivation of property without due process of law. The case reviews the cases of Carey *v.* Atlanta (Ga.), 84 S. E. 456 and State *v.* Gurry, 121 Md. 538, 88 Atl. 546, and the ordinances considered in those cases, distinguishing such ordinances from the ordinances of Louisville, in that the ordinances of Baltimore and Atlanta contain no reservation in protection of vested rights existing at the time of their enactment, while the ordinances of the City of Louisville contain the following clauses:

> "Nothing in this ordinance shall affect the location of residences, places of abode or places of assembly made previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent the occupation of residences, places of abode or places of assembly by white or colored servants or employees of occupants by such residences, places of abode or places of public assembly on the block on which they are so employed, nor shall anything herein contained be construed to prevent any person who, at the date of the passage of this ordinance, shall have acquired or possess the right to occupy any building as a residence, place of abode or place of assembly from exercising such a right.
>
> Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of public assembly for colored persons from continuing to rent, lease or occupy such residence, place of abode or place of assembly for such persons, if the owner shall so desire; but if such house should, after the

passage of this act, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for white persons, it shall not thereafter be used for colored persons, if such occupation would then be a violation of Section 1 hereof.

Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of assembly for white persons from continuing to rent, lease or occupy such residence, place of abode or place of assembly for such purpose, if the owner shall so desire, but if such house should, after the passage of this act, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for colored persons, it shall not thereafter be so used for white persons, if such occupation would then be a violation of Section 2 hereof."

It was said in the lower court "if it is competent at all for the city to pass a segregation ordinance, it seems to the court that it must be held that the one in question is valid, for it is as fair, reasonable and just, in its provisions as such a measure could well be made."

What Is Property.

While what is private property within the meaning of the fourteenth amendment is not easy to determine, and no decision has attempted to formulate a rule that will embrace every instance, the term as applied to lands, comprehends every species of title, inchoate or complete, which lie in contract and which are executory as well as those which are executed. Soulard *v.* United States, 4 Pet. 511. These ordinances undoubtedly affect property rights, and whether they are unconstitutional for that reason depends upon whether they are a legitimate exercise of a governmental power, to which the right of the individual must succumb to the welfare of the general public.

What Is Deprivation.

While it is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision, for there may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, yet it is not

the enactment of a law providing for the taking of private property which violates the fourteenth amendment, but the actual taking of the property under the authority of the act. Although such ordinances may by possibility in their terms affect private property, under this principle objection to them can not be taken until there has been an actual deprivation. This means, a person who has not been actually deprived of his property without due process of law can not complain and would have no standing in court. This principle is applicable to the case of Ashland *v.* Coleman, 19 Va. Law Reg. 427.

Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.

The fourteenth amendment does not contemplate injuries which are merely consequential, where the property is not directly touched by the legislative action but is affected only in an incidental and consequential way. L'Hote *v.* New Orleans, 177 U. S. 587, 600, 44 L. Ed. 899. And even though the injury is direct, yet if it is only incidental to the legitimate exercise of governmental powers for the public good, the individual can not complain. See New Orleans Gas Light Co. *v.* Drainage Commission, 197 U. S. 453, 19 L. Ed. 831.

Ordinances which do not require the immediate vacating of any premises by those of either race, nor prohibit the reoccupancy of property vacated by one race, although the majority of those upon the block may be of the other race, but which simply provide that when such occupancy had changed from the one race to the other it must remain unchanged if the majority of the residents of the block are of the race to which such change is made, are extremely mild in their operation; and if it can be shown that they are intended to accomplish good and are not discriminatory in their provisions respecting the two races, they would seem to be a perfectly legitimate exercise of the police power of the state, and not an unconstitutional deprivation of private property. Such are the Louisville ordinances.

As a matter of fact, the ordinances in their operation will tend to protect residence property values from the most ruthless de-

struction, although incidentally they may work some slight and temporary loss to some few property owners. For instance, in a block where there are a large number of negroes, but where nevertheless the majority of houses are occupied by whites and a house thereon which had previously been occupied by a white person becomes vacant, it is conceivable that the owner might find it difficult to rent it again to a white person, and under the law he would not be permitted to rent it to a negro, so that there would be a period when this house might remain vacant. But in the very nature of things under the case stated, this block would soon be so far deserted by the whites that the majority of its occupants would be negroes and it would be an easy matter then to rent the entire block to negroes, which would be the logical working out of the law. Offsetting this temporary loss of rent to a few property owners, it must consider on the other hand the immediate, permanent and most destructive loss in property values which results where the negroes are allowed without legal restraint to invade the white sections of the city, which these ordinances seek to prevent. The schemes of real estate dealers seeking the reduction of values of residences by leasing to negroes in order to purchase at an unfair advantage is familiar to all and has been successfully practiced.

Restraint of Alienative.

These ordinances work at least a partial restraint upon the right to alienate property.

In State *v.* Darnell, 166 N. C. 300, 81 S. E. 338, it is pointed out that the right of disposing of property, the jus disponendi, is one of the inalienable rights incident to the ownership of property of which the owner can not be constitutionally deprived, and that an ordinance which forbids the owner of property to sell or lease it to whomsoever he sees fit and also forbids those who may be desirous of buying or renting property from doing so wherever they can make the best bargain, is unconstitutional.

But in Harris *v.* Louisville (Ky.), 177 S. W. 472, it is held that the segregation ordinances of the city of Louisville which prohibit any colored person from occupying as a residence or place of assembly for colored people a building in any block in which the greater part of the houses are occupied by white persons,

and vice versa, but which provide that they shall not affect the location of residences or places of assembly made previous to their enactment, nor prevent any person who has theretofore acquired a building for a residence or place of assembly from exercising such right, do not take away the right of alienation, but are merely a restriction on alienation by taking away the probability of alienation to certain classes of purchasers, and, as such, can not be held to deprive the owner of a vested right. The court said: "The jus disponendi has but little place in modern jurisprudence. The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the state in respect thereof, so that today all private property is held subject to the unchallenged right and power of the state to impose upon the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare. There is nothing in the ordinance here under consideration which takes away from any person the right to acquire property anywhere in the city; but the ordinance does prohibit the occupancy of property under certain circumstances, by an owner who acquires same after the adoption of the ordinance; and such restraint upon the use of property acquired with notice of a regulatory ordinance is valid as a competent declaration of the municipal legislature. If it be conceded that the right of alienation is a vested right which can not be taken away altogether by legislation, still such is not the effect of the ordinance. An indirect restriction upon the right of alienation, resulting from the denial of the probability of alienation to certain classes of purchasers, can not be held to be a complete destruction of the power to alienate or deprivation of a vested right, violative of the constitutional guaranties. So much for the jus disponendi."

The test of the validity of the ordinances under this objection is the reasonable necessity of the restriction of the owner in the disposition of his property to such extent for the welfare of the general public.

IN EXERCISE OF POLICE POWER.

The inhibition against taking property without due process of law imposes no restriction upon the inherent power of the state to protect the lives and secure the safety of the people by reasonable regulations. Persons and property may be subjected to all kinds of restraints and burdens in order to secure the general comfort and prosperity of the state, and uncompensated obedience to a regulation enacted for the public safety or general welfare under the police power of the state is not a deprivation of property without due process of law. The exercise of the police power often works pecuniary injury, but the settled rule is that the mere fact of pecuniary injury to property does not warrant the overthrow of legislation of a police character upon the theory that the owner of the property so injured is deprived of his property without due process or without compensation in violation of the fourteenth amendment. L'Hote *v.* New Orleans, 177 U. S. 587, 598, 44 L. Ed. 899.

It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall be so regulated that it be not injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. The general proposition that a man may do what he will with his own is subordinate to another which finds expression in the familiar maxim, sic utere tuo ut alienum non lædas. It is not, therefore, a condition of the exercise of the authority of the state in this respect that it shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it with-

out due process of law. Down to the time of the adoption of the fourteenth amendment it was not supposed that statutes regulating the use or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular it simply prevents the states from doing that which will operate as such a deprivation. Munn *v.* Illinois, 94 U. S. 113, 125, 24 L. Ed. 77.

The acknowledged police power of a state extends often to the destruction of property. The right of necessity, it is said, forms a part of the law, and it is better that an individual property owner should suffer a private mischief rather than a public inconvenience. This is a power essential to self-preservation and exists, necessarily, in every organized community, and where in the exercise of such power property is destroyed, as contra-distinguished from taken, in the interest of public safety, the owner is not entitled to compensation. Respublica *v.* Sparhawk, 1 Dall. 357, 362.

In upholding the Louisville ordinance it was held in Harris *v.* Louisville (Ky.), 177 S. W. 472, that, the advance of civilization and consequent extension of governmental activities has resulted in lessening the dominion of individuals over their property and strengthening the state's regulation thereof, until all private property is now held subject to the right of the state to impose on the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare. In this same case the lower court said: "Counsel further seem to drift into the common error of assuming that ownership of property, so called, is absolute and unqualified, forgetting that the ultimate title to all property is vested in the sovereign, and that the highest possible title that can be carved out of any landed estate in favor of a citizen is, after all, but a right to its use, subject to such conditions and regulations as the state, its ultimate owner, may see fit from time to time to impose for the common good. Indeed, without these important rights reserved to the State, and the intelligent exercise of such right upon proper occasion, the value of such property to the owner of the fee simple, or other estate therein, would be very greatly impaired. If the municipal

legislature, therefore, in good faith discharging its obligations to the residents of the city, has sought, as the title to the ordinance declares, 'to prevent conflict and ill-feeling between the white and colored races of the city of Louisville, and to preserve the public peace, and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively,' and in doing this, they have contravened no fundamental right of any citizen, this ordinance should be upheld."

But of the Baltimore ordinance the court said in State *v.* Gurry (Md.), 88 Atl. 546, "We do not lose sight of the fact that the absolute control of property by an owner may be subject to reasonable regulations under the police power of the State. An owner of property can not establish a bawdy house or other nuisance in it because he is the owner of it. He can not necessarily use it just as he pleases, if such use thereby injuriously affects others. He may be prohibited from using it while it is in such condition that the use of it will be dangerous, or, in some cases, will be injurious to others. He may be prohibited from manufacturing or selling intoxicating liquors in it. Other instances might be given of the exercise of the police power, but we have not hitherto known of a case which approached the exercise of such power as is contended for under this ordinance—to prohibit one who was the owner of a dwelling when the ordinance was passed from moving into it, simply because he is a different color from other persons using that block as residences or places of abode, although he might keep his premises in better sanitary condition and in every way more attractive than others. He may be quite as well-behaved and as law-abiding as the other residents of the block; he may have paid more for his house than the others for their respective houses, or may have inherited the family residence. It is not because there is any reason why it could not or should not be used as a dwelling, but simply because he is white and the others colored. Such an ordinance may work some hardships, even as to after-acquired property; but if property is acquired where valid laws or ordinances affecting it are in force, it is taken subject to them."

Is this a proper subject of police regulation? It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Noble State Bank *v.* Haskell, 219 U. S. 104, 111.

The police power of the State so far has not received a full and complete definition. It may be said, however, to be the right of the State to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which did not encroach on a like power vested in Congress by the Federal Constitution, or which did not violate any of the provisions of the organic law. Champer *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390.

The power to impose such restrictions upon private rights as are practically necessarily for the general welfare. State *v.* Wagener, 77 Min. 483, 80 N. W. 633. 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681.

The constitutional guaranties for the security of private rights have never been understood as interfering with the power of the State to pass such laws as may be necessary to protect the health and provide for the safety and good order of society. Deems *v.* Mayor, 80 Md. 173, 30 Atl 650, 26 L. R. A. 541, 45 Am. St. Rep. 339.

Neither the fourteenth amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people. Barbier *v.* Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. 357.

The segregation of the white and colored races for the purpose of preserving peace, preventing conflict and ill feeling, and promoting the welfare of the city, by requiring that blocks occupied exclusively by one race should continue to be so occupied, is an object properly admitting of the exercise of the police power granted to the city of Baltimore by its charter. State *v.* Gurry (Md.), 88 Atl. Rep. 346, 347.

Has a person the absolute right to reside where he pleases,

or is this right subject to regulation and control by the State or its agency under its police power? Generally a person has the right to choose his residence wherever he acquires the right and has the means to establish it; but this right it would seem is subject to the police power, whenever any of the objects of such power require for their attainment deprivation of the right of the individual to choose his own place of residence.

The doctrine that a person whose property is injured or depreciated in value through the exercise of the police or other governmental powers is not entitled to compensation and is not deprived of his property without due process of law, is subject, of course, to the qualification that the means employed must have some direct, real and substantial connection with the public object intended to be accomplished, and that the governmental power is not arbitrarily or colorably exercised or used as a subterfuge for oppressing an individual and depriving him of his property without compensation. There is the constant warning present, practically in all the cases, in the examples and rule, that the exercise of the power must not be unreasonable, but must be enacted in good faith, for the promotion of the public good, and not for the oppression or annoyance of a particular class. Plessy *v.* Ferguson, 163 U. S. 555, 16 Sup. Ct. 1138, 41 L. Ed. 256. It is not to be understood, however, from the doctrine as here stated, that the states are at liberty to turn the police power into an instrument for the destruction of private rights of person or property without rhyme or reason or compensation for property taken. It is only reasonable regulations having some bona fide adaptation to the accomplishment of some lawful end which are permitted, and even of this the legislature is not the final judge. The legislature may not, under the guise of protecting and promoting the public safety, health, morals or general welfare, arbitrarily interfere with private business or with personal and property rights; and if legislation enacted for the ostensible purpose of promoting the public safety, health, morals, or general welfare, has no real or substantial connection with the public object sought to be accomplished, or if it is arbitrary and unreasonable, or beyond the necessities of the case, the judiciary will disregard mere forms and interfere

for the protection of rights injuriously affected by such illegal action. Mugler *v.* Kansas, 123 U. S. 623, 669.

In Carey *v.* City of Atlanta (Ga.), 84 S. E. 456, the court held unconstitutional an Atlanta ordinance which was said to have been modeled after the first Baltimore ordinance, but which had in addition the remarkable provision that a person of one color occupying a house in a mixed block could object to one of another color moving next door to him. Consequently the court found that under the ordinance the following startling result might be brought about: If on one side of a house the occupant was white and on the other side was colored the white person might object to a negro moving into the middle house and the negro might object to a white person moving therein, so that by the mere caprice of abutting proprietors the owner might be deprived for all the time of the right to reside on his property or to substitute a tenant of either color therein. The court found no difficulty in holding invalid an ordinance so obviously unreasonable and unconstitutional.

The ordinances must be reasonable as applied to the particular subject-matter. Likewise a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated. Therefore all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact the rule is of universal application that a clear case should be made out to authorize the court to interfere with the exercise of the police powers of a municipal corporation on the ground of unreasonableness. McQuillin on Municipal Ordinances, vol. II, § 732.

"It is not the hardship of the individual case that determines the question, but rather the general scope and effect of the legislation as an exercise of the police power in protecting health and promoting the welfare of the community at large." Tenement House Department *v.* Moeschen (N. Y.), 70 L. R. A. 704; (affirmed in 203 U. S. 583).

The legislature may determine the exigency, that is the oc-

casion for the exercise of the police power, but the judiciary determines what are the subjects and objects upon which the power is to be exercised and the reasonableness of that exercise. Judicial authority to declare an ordinance reasonable is a power to be cautiously exercised. The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances, and hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence. In questions of doubt the courts are inclined to defer to the discretion and judgment of the municipal authorities. To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city which would be absurd in the country. Likewise a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated. Therefore, all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact, the rule is of universal application that a clear case should be made out to authorize the court to interfere with the exercise of the police powers of a municipal corporation on the ground of unreasonableness. McQuillin on Municipal Ordinances, § 186.

"It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But, notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise

of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property." Dobbins *v.* Los Angeles, 195 U. S. 223, 235, 49 L. Ed. 169.

SIMILAR REGULATIONS.

The determination of the constitutionality of these ordinances may be aided by a comparison to other similar regulations which have been held constitutional.

As far back, at least, as the time of Moses, quarantine laws have been upheld. Lev. 13: 46. Quarantine laws are a proper subject of the exercise of the police power of a state for the protection of the health of its citizens. Smith *v.* St. Louis, etc., Ry. Co., 181 U. S. 248, 256.

Laws providing for separate railroad coaches for white and colored persons have been held within the police power of a State. So far as the conflict of such laws with the fourteenth amendment is concerned, the case reduces itself to the question whether the State law is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislative power of the State. In determining the question of the reasonableness of the law the legislature is at liberty to act with reference to the established usage, customs and traditions of the people, and with a view to promote their comfort and preserve the public peace and good order. Plessy *v.* Ferguson, 163 U. S. 537. This, it would seem, is determinative of the validity of the segregation ordinances; that is, such ordinances are constitutional where they are reasonable regulations, intended to promote the preservation of public peace and good order.

Laws forbidding the intermarriage of the two races may be said, in a technical sense, to interfere with the freedom of contract, yet to have been universally recognized as within the police power of the State. Plessy *v.* Ferguson, 163 U. S. 537. In view of the foregoing, therefore, "it can hardly now be questioned that the police power may be exercised, not only in the supreme matter of preserving the solidarity of the two races by inhibiting their miscegenation, but also in the less though very

important matter of their mere propinquity. Indeed, it is well understood that this latter subject bears a very close relationship to the former, and that one of the objects, though not at all the sole object, of laws which effect a separation of the members of the race is to furnish an added safeguard against the mixture of their blood. Moreover, the great and growing importance to the welfare of the body politic as a whole of such legislation may, it seems to the court, be fairly inferred from the simple fact of there having been as much of it as there has been." Buchanan *v.* Warley, No. 88,705, Jefferson Circuit Court of Louisville.

Congress has provided for the compulsory separation of the members of the two races in the schools of the District of Columbia, and many of the States have similar statutes, which have universally been upheld as constitutional by the supreme court of the United States, and by the courts of final jurisdiction of the several States. See Berea College *v.* Commonwealth, 123 Ky. 209. The court will not close its eyes to the fact that, under the congested conditions of modern municipal life, there is practically as much, if not a greater degree of, association among the children of white and colored inhabitants when living side by side than there would be in mixed schools under the direct observation of teachers. Harris *v.* Louisville (Ky.), 177 S. W. 472.

Laws providing for the segregation of abandoned women have been held the proper subject of the police power. L'Hote *v.* New Orleans, 177 U. S. 587.

An ordinance of a city, which under its special charter was given all the police power of the State as to acts which could be made minor offenses, making it unlawful for any white person and any negro to have sexual intercourse with each other within the city limits, each act to be a separate offense, and declaring its violation a misdemeanor, is a valid exercise of the police power. Strauss *v.* State (Tex. Cr. App.), 173 S. W. 663

CONCLUSION.

Segregation ordinances which are intended to operate as bona fide police regulations, are reasonably necessary for that pur-

pose, operate reasonably, and do not unduly interfere with private rights, are constitutional.

The bona fides of these ordinances can not be made a serious question in law or economy. The different cities have striven to do a public good, and have not been actuated merely by race prejudice. The truth is these ordinances are a natural outgrowth of existing conditions and are in the most instances intended to preserve such conditions, by preserving present separate residences and preventing one race encroaching upon the other. The ordinances are intended to protect each race from harm from the other.

These regulations to be constitutional need not be absolutely necessary; a reasonable necessity therefor is sufficient. Those familiar with conditions in cities having divided populations must admit such necessity exists, when the habits, characteristics and conditions of both races are considered. It is useless to maintain that it would be best for the colored to reside with the white persons, for to such the white persons will not consent. There is a necessity for such regulation, and a study of conditions will lead one to affirm such statement.

The reasonableness of these ordinances is not easy of determination. What is reasonable in one city may not be in another, what is reasonable as to the inhabitants of one community may not be as to another. In Atlanta such a regulation would be reasonable, while in Boston it would not. Reasonableness is a fact to be determined in each particular case, with reference to the habits and characteristics of the people and the density of population of the municipality. One important fact to be taken into consideration is the location of the residences of the races at the time the ordinances are passed. If white and colored people are interspersed throughout the city, it would undoubtedly be unreasonable to attempt segregation by blocks; but, if the races are already practically segregated and the ordinances are to operate by way of protection by preventing a change, the ordinances would certainly seem to be reasonable.

Undue interference with private property can be a constitutional objection when private property is injured and no public necessity therefor exists—in other words, where there is no

necessity for such regulation or where, in attempting to answer the necessity, the city enacts an unreasonable ordinance.

Of the effect of segregation it has been said in an unreported case: "When a negro moves into a white block, either one of two things must happen. He must either move again or one house after another on that block will be turned over to the negroes until it becomes a negro block; for it is a fact universally recognized that on account of the antagonism that exists between the white and colored races wherever found, they can not continue to live together on a basis of social equality without ill feeling and friction and in many cases outbreaks of violence. Applying this fact of human nature, it is easy to see how the present ordinance will operate, the good it will accomplish and the evils which it may be expected to cure. Its primary purpose is to reduce the ill feeling and conflict between the races which every one knows result where the members of the two races are thrown into intimate association, and especially where they are placed in the close contact of neighbors on the same block. Where, therefore, when this law went into effect there were no negroes on a white block, that block would be entirely free from this dread invasion in the future; and a man, whether he be rich or poor, could feel a security in the possession and enjoyment of his home which he had never before known. The same thing will be correspondingly true of a block on which all the houses are occupied by negroes. Where, however, there are one or two negroes on a block, but the other houses are occupied by whites, there will be no more negroes moving into that block, and in the course of time those one or two negroes will in all probability disappear from that particular block and will seek homes among their own people. Where again a large number of houses on a block are occupied by negroes, although not a majority, it is probable that in the usual course of things the whites on that block, recognizing that it is unlikely that the negroes will all move out, will themselves move one after another until a majority of the occupied houses remaining are occupied by negroes. The block will then automatically become a negro block, and finally all the whites on that block will have deserted it for a white neighborhood. And

finally, when a majority of the houses on a block are occupied by negroes, although a large percentage of the houses remaining have white occupants, no more white occupants can move in and those living on the block will sooner or later seek a white neighborhood until the block becomes a wholly negro block. Thus the law will work gradually with the least amount of hardship to any property holder until there will be a fairly well defined separation of the races in the city in the matter of homes, accomplishing the purpose sought by the ordinance. Of course, we must not lose sight of the fact that at the time this ordinance was passed there was a natural and normal voluntary segregation of the races actually existing, and the ordinance will only deal with what may be termed the 'twilight zone,' and where the conflicts would most likely arise."

T. B. BENSON.

Note.

See article by James F. Minor in 18 Va. Law Register, 561. As this article goes to press there is a case involving the question pending in the Supreme Court of Appeals of Virginia.